

# 39

PTO/SB/64 (08-03)

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U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

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**PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED  
UNINTENTIONALLY UNDER 37 CFR 1.137(b)**

Docket Number (Optional)

First named inventor: Richard Mettke

Application No.: 09/134,831

Art Unit: 2643

Filed: August 17, 1998

Examiner: Stella Woo

Title: On-Line Communications Terminal / Apparatus

Attention: Office of Petitions  
Mail Stop Petition  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450  
FAX: (703) 308-6916

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PETITIONS OFFICE

NOTE: If information or assistance is needed in completing this form, please contact Petitions  
Information at (703) 305-9282.

The above-identified application became abandoned for failure to file a timely and proper reply to a  
notice or action by the United States Patent and Trademark Office. The date of abandonment is the day after the  
expiration date of the period set for reply in the Office notice or action plus an extensions of time  
actually obtained.

**APPLICANT HEREBY PETITIONS FOR REVIVAL OF THIS APPLICATION**

NOTE: A grantable petition requires the following items:

- (1) Petition fee;
- (2) Reply and/or issue fee;
- (3) Terminal disclaimer with disclaimer fee --required for all utility and plant applications  
filed before June 8, 1995; and for all design applications; and
- (4) Statement that the entire delay was unintentional.

**1. Petition fee**

☒ Small entity-fee \$ 655.00 (37 CFR 1.17(m)). Applicant claims small entity status. See 37 CFR 1.27.

☐ Other than small entity - fee \$ \_\_\_\_\_ (37 CFR 1.17(m))

**2. Reply and/or fee**

A. The reply and/or fee to the above-noted Office action in  
the form of \_\_\_\_\_ (identify type of reply):

- ☐ has been filed previously on \_\_\_\_\_  
☒ is enclosed herewith.

B. The issue fee of \$ \_\_\_\_\_

- ☐ has been paid previously on \_\_\_\_\_  
☐ is enclosed herewith.

[Page 1 of 2]

This collection of information is required by 37 CFR 1.137. The information is required to obtain or retain a benefit by the public which is to file (and by the  
USPTO to process) an application. Confidentiality is governed by 36 U.S.C. 122 and 37 CFR 1.14. This collection is estimated to take 1.0 hour to complete,  
including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments  
on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent  
and Trademark Office, U.S. Department of Commerce, P.O. 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS  
ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

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### 3. Terminal disclaimer with disclaimer fee

- ☒ Since this utility/plant application was filed on or after June 8, 1995, no terminal disclaimer is required.
- ☐ A terminal disclaimer (and disclaimer fee (37 CFR 1.20(d)) of \$ \_\_\_\_\_ for a small entity or \$ \_\_\_\_\_ for other than a small entity) disclaiming the required period of time is enclosed herewith (see PTO/SB/63).

4. **STATEMENT:** The entire delay in filing the required reply from the due date for the required reply until the filing of a grantable petition under 37 CFR 1.137(b) was unintentional. [NOTE. The United States Patent and Trademark Office may require additional information if there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137(b) was unintentional (MPEP 711.03(c), subsections (III)(C) and (D))].

See Attached enclosure

**WARNING:** Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.

11/4/03

Date

Telephone  
Number:

614-861-1847



Signature

Richard P. Mettke

Typed or printed name

7921 Piquoy Court

Address

Reynoldsburg, OH

Address

43068

Enclosures: ☒ Fee Payment

☒ Reply

☐ Terminal Disclaimer Form

☒ Additional sheets containing statements establishing unintentional delay

☐ Other: \_\_\_\_\_

### CERTIFICATE OF MAILING OR TRANSMISSION [37 CFR 1.8(a)]

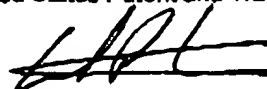
I hereby certify that this correspondence is being:

☐ deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

☒ transmitted by facsimile on the date shown below to the United States Patent and Trademark Office at (703) 308-6916.

11/4/03

Date



Signature

Richard P. Mettke

Type or printed name of person signing certificate

Application Number 09/134,831

**Enclosure to Petition For Revival of An Application For Patent Abandoned Unintentionally Under 37 CFR 1.137 (b), Application number 09/134,831**

The following response is provided to support the delay in filing a proper reply:

Reference: Office of Petitions response on request for Petition for Revival of an Application for Patent Abandoned Unintentionally under 37 CFR 1.137 (a), dated September 30, 2003 (enclosed) *Unavoidably*


The following statement is provided to support this Petition For Revival of An Application For Patent Abandoned Unintentionally Under 37 CFR 1.137 (b) (in accordance with the Office of Petitions recommended alternative venue in reference above).

The entire delay in filing a required reply was that the applicant had the impression that his case was moving forward. The applicant was diligent in responding to the Examiners office actions (and had in fact filed a petition to the commissioner in November 2002 concerning this application. It was dismissed because of the abandonment action that the applicant became aware of in a letter from the PTO dated June 5, 2003). During the application process, the applicant kept responding to office actions provided by the Examiner, leading the applicant to believe that a favorable action was pending.

Because of the examiners continued responses, and applicant's pursuit of moving the process forward, the applicant was unaware of the time constraints. He in fact filed a petition to the commissioner within the time frame that the Examiner provided in the last office action that required a reply.

In the time period between the applicants "Petition to the Commissioner (25 NOV 02) and the date of the now known "Abandonment", the applicant provided no less than three responses/amendments. Furthermore, the applicant had asked the Examiner on many occasions for constructive assistance and clarification, to no avail. Applicant requests, in light of the above information, that this petition be favorably considered.

Respectfully,

  
Richard P. Mettke

7921 Panary Court,  
Reynoldsburg, OH 43068

TEL: 614-424-6446  
FAX: 614-458-6446  
Email: rmettke@aol.com  
Enclosure

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PETITIONS OFFICE

Application Number 09/134,831



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS  
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Richard Mettke  
7921 Panary Court  
Reynoldsburg, OH 43068

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SEP 30 2003

**OFFICE OF PETITIONS  
ON PETITION**

In re Application of  
Richard Mettke  
Application No. 09/134,831  
Filed: August 17, 1998  
Attorney Docket Number: 6388.005  
Title of Invention: ON-LINE  
COMMUNICATIONS  
TERMINAL APPARATUS

This is a decision on the petition filed August 18, 2003, under 37 CFR 1.137(a) to revive the above-identified reissue application.

The petition to revive under 37 CFR § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR § 1.137(a)." This is not a final agency action within the meaning of 5 U.S.C. § 704.

This above-identified application became abandoned for failure to timely file a proper reply to a final Office Action pursuant to 37 CFR § 1.113. The final Office Action was mailed on March 12, 2002 and set a three (3) month shortened statutory period for reply. An amendment was submitted on April 24, 2002. In response to the amendment an Advisory Action was mailed on May 15, 2002 indicating the amendment submitted on April 24, 2002 did not place the application in condition for allowance. A second advisory action mailed June 25, 2002 informed petitioner the amendment of May 29, 2002 did not place the application in condition for allowance. A third advisory action was mailed on October 11, 2002 in response to the amendment submitted on September 16, 2002 informing petitioner the amendment did not place the application in condition for allowance. A petition under 37 CFR 1.181 was dismissed on June 5, 2003. Accordingly, this application became abandoned on June 13, 2002. A Notice of Abandonment was mailed on June 9, 2003.

<sup>1</sup>It is noted the amendment submitted on September 16, 2002 was untimely. Although petitioner submitted a 4 month request for extension of time along with the amendment, the maximum extendable period for reply expired on September 13, 2002.

Enclosure

**PETITION TO REVIVE UNDER 37 CFR § 1.137(a)**

a grantable petition under 37 CFR § 1.137(a) must be accompanied by:

- (1) the required reply,<sup>2</sup>
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks items (1) and (3).

The instant petition lacks item (1) the required reply. The proposed reply required for consideration of a petition to revive after a final Office Action must be a Notice of Appeal (and appeal fee required by 37 CFR 1.17(b)), an amendment that prima facie places the application in condition for allowance, the filing of a continuing application or a Request for Continued Examination (RCE). See MPEP 711.03(c)(III)(A)(2) and 37 CFR 1.114.

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR § 1.137(a).

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullah, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a case-by-case basis, taking all the facts and circumstances into account. Smith v. Messinghoff, 571 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982); a petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a).<sup>3</sup> Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the

<sup>2</sup> In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

<sup>3</sup> See MPEP 711(c)(III)(C)(2) for a discussion of the requirements for a showing of unavoidable delay.

~~Petitioner's arguments have been considered but they are not persuasive. Petitioner asserts the application was unavoidably delayed because Examiner kept on responding to applicant's numerous amendments leading applicant to believe that a favorable action was pending. Furthermore applicant states he was unaware of the time constraints.~~

Thus, petitioner has failed to provide sufficient facts to warrant the finding of unavoidable delay within the meaning of 37 CFR 1.137(a).

### Alternative Venue

The filing of a petition under 37 CFR § 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. a person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR § 1.137(b), was unintentional. a statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR § 1.137(b).

By mail: Mail Stop Petition  
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<sup>5</sup>See Haines v. Oviatt, 673 F. Supp. 314, 317, 5 USPQ2D 1130, 1132 (N.D. Ind. 1987); Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985) Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130,131 (1891).

Alexandria, VA 22313-1450

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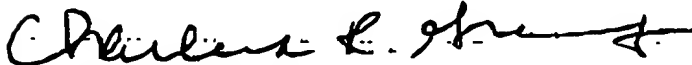
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Arlington, VA 22202

Telephone inquiries should be directed to the undersigned at (703) 306-0251.



Charlema R. Grant..  
Petitions Attorney  
Office of Petitions..